File No.: 4096

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

LATINO EXPRESS OF CHICAGO, LLC,

Employer,

Case Nos.: 13-CA-046528;

13-CA-046529; 13-CA-046634

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 777,

Petitioner.

Employer's Brief of Position on Social Security and Income Tax Remedies

NOW COMES the Employer, LATINO EXPRESS OF CHICAGO, LLC and in response to the Board's invitation of all interested parties to file a brief addressing the issues of whether, in connection with an award of backpay, the Board should routinely require a respondent to: (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters and (2) reimburse a discriminate for any excess federal and state income taxes the discriminate may owe from receiving a lump-sum backpay award, states as follows:

In General Counsel's Brief of Position on Social Security and Income Tax Remedies, the argument in summary is one in which the General Counsel is endorsing that the respondent, Latino Express of Chicago, LLC be required to not only make a determination and pay the amount of the backpay but to increase that backpay award to take into consideration any tax consequences. In their brief, General Counsel argues extensively in favor of this position because of the negative tax consequences that can be incurred by a discriminatee when backpay is ordered. 1 In summary,

¹ It should also be noted that an Amicus Brief was filed by the American Federal of Labor and Congress of Industrial Organizations endorsing the General Counsel's position.

the issue is one that is of no consequence in the instant case. General Counsel argues in page after page that the tax consequences should be adjusted because of the increased tax exposure to the discriminatee as a result of a lump sum payment and the resulting push of the discriminatee from one tax bracket to another higher one.

ARGUMENT

First, General Counsel conveniently excludes the effect of unemployment compensation insurance payments that have been paid to the discriminatees during the time period of which they seek recovery. As eloquently argued by General Counsel, the goal of the award and the purpose of the Act is to put the discriminatees in the same position that they would have been in had they not been the victim of the alleged discrimination. By awarding them backpay together with any tax additions, the discriminatees are actually benefiting and receiving an amount in excess of what the Board has awarded. By failing to set off the amounts of the unemployment compensation received against the amount awarded, the discriminatees will receive a windfall of approximately 80% of the amount of the backpay2. If the remedy that is being sought by the general counsel is granted by the Board, the discriminatee would have received the gross amount of the wages without any deduction for taxes or social security payments, without any deductions for monies received by them from unemployment compensation and, additional money for tax consequences that have yet to be determined and are unlikely to occur.

If the Board accepts the General Counsel's Argument and establishes this policy and formulation going forward, it would result in a policy in which all future discriminatees would seek to do whatever they can to be the victims of the discrimination because of the financial windfall that would be given to them. This is especially true in the State of Illinois since the payments that are made for unemployment compensation are based upon a percentage of the amount of lost pay. In other words, under the award formula proposed by the General Counsel, it is more profitable to be the victim of discrimination then to keep working as a bus driver in the instant case. Surely this cannot be the goal of the Board.

² The exact amount cannot be determined until such time as the Board issues a decision with a total dollar amount of back wages to be paid.

Second, in determining the proper course in these kinds and types of claims and lump sum awards, public policy should be considered by this Board. First, while case law seems to support that the amount of award for backpay should not take into consideration unemployment benefits paid to the employee, there is no just reason not to consider those exact same benefits in determining whether or not an employee should be additionally compensated because of a lump sum payment resulting in a higher tax bracket. In reality, and in the case bar, both employees who were terminated by Latino Express received cash unemployment compensation from their date of termination to the very date that Judge Grady ordered them reinstated. In the State of Illinois, as in most states, unemployment compensation benefits are taxable in the year they are received. This would reduce or diminish any tax disparity from year to year during the time of the allegedly unlawful termination and reinstatement. So while the Board may not want to consider unemployment compensation in determining the amount of the award, unemployment compensation and the taxes paid on that benefit should and must be considered by the Board in determining benefits for tax consequences. This is especially true since under state law in Illinois, any amounts received in a lump sum payment that would be allowable for back wages must be returned to the State of Illinois either through direct payment from the recipient of those benefits or from the employer by withholding that amount from the lump sum payment and making payment directly to the State of Illinois. cite omitted Any other formula would result in the employee being unlawfully paid twice for the same period of unemployment. Respondent is not here arguing for an overturn or reduction in the amount of back pay award on a dollar for dollar basis based on the amount of unemployment benefits received by the discriminatee. However, in calculating taxable liability of the distrciminatee, the amount of unemployment benefits received by the employee must be considered since those benefits are taxed and would mitigate any year to year disparity in tax rates between the time of the allegedly wrongful termination and the receipt of any back pay award issued.

SUMMARY

The General Counsel argues that both the tax component and backpay and employer notification of social security are appropriate Board remedies. Inasmuch as the basic tax rate is one that should be paid by all employees, whether or not they are paid in one quarter or another,

those tax liabilities should and must be incurred by the alleged discriminatee. To order otherwise would result in a windfall and unjust enrichment. Employer notification of social security are appropriate remedies and the employers notification of social security changes are simply a matter of correspondence. Any information or documentation that is necessary to accomplish this can be provided to the alleged discriminatee with a simple request. General Counsel argues that "to redress this unfairness is to allow the discriminatee to request to "gross up" their backpay in order to offset the increased tax liability incurred by virtue of receiving backpay in one lump sum. In considering any tax liability of the employees, unemployment benefits must be considered since the receipt of and taxes paid on those benefits would mitigate any unfair or burdensome tax rate disparity that would occur at the time of any lump sum payment.

Respectfully submitted,

Zane D. Smith

ZANE D. SMITH & ASSOCIATES, LTD. 415 N. LaSalle Street - Suite 300 Chicago, Illinois 60654 (312) 245-0031 (312) 245-0022 - Fax

CERTIFICATE OF SERVICE

I, Patricia A. Meinke, a non-attorney, on oath state that I served the foregoing document to all attorneys of record by electronically filing and mailing a true and correct copy of same on August 22, 2012 before the hour of 5:00 P.M. with proper postage pre-paid. Under the penalties of perjury, I certify that the above statements set forth herein are true and correct.

Mula () Menke
Patricia A. Meinke